

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

iRACING.COM MOTORSPORT SIMULATIONS LLC,)	
a Delaware Limited Liability Company, Plaintiff)	
)	
V.)	Civil Action No.
)	05-11639 NG
TIM ROBINSON, individually and d/b/a)	
<u>www.ow-racing.com</u> and <u>www.torn8oalley.com</u> ,)	
Defendant)	

DEFENDANT TIM ROBINSON'S OPPOSITION TO
PLAINTIFF'S "MOTION TO COMPEL AND FOR SANCTIONS"

Prior Relevant Proceedings

Plaintiff served a Second Request for Production of Documents¹ upon Defendant, to which Defendant filed a response, and produced documents in November 2005. Plaintiff took Defendant's deposition in November 2005 and determined that additional documents existed that Plaintiff deemed responsive to its document requests. Plaintiff served a December 13, 2005 letter request on defendant's counsel (Pltf's Motion, Ex. A).

On January 10, 2006, defendant's counsel produced seventeen (17) CD-roms to plaintiff's counsel. Pltf's Motion, p. 3. Collectively, these CD-roms contain well over a thousand individual computer files.

On January 12, 2006, plaintiff's counsel sent an email to defendant's counsel, requesting that Robinson execute an Affidavit regarding the files that had been produced, including that he had produced all of the relevant files. (Attachment 1). After clarifying the scope of the

¹ The undersigned counsel is unaware of any "First" request.

requested Affidavit (Attachment 1), Robinson executed, and defendant's counsel sent to plaintiff's counsel on January 18, an Affidavit attesting to the files that had been produced and that they represented all known relevant files. (Attachment 2).

On January 24, 2006, plaintiff's counsel sent an email insisting that there must be additional files and documents that had not been produced (Attachment 3). After making inquiry of Robinson, defendant's counsel sent a reply email confirming that there were no known additional relevant files (Attachment 3). Plaintiff nevertheless proceeded to file its Motion to Compel.

Argument

A. Robinson has complied fully with Plaintiff's requests; the Motion should be denied in its entirety

The gravamen of what plaintiff alleges that Robinson has failed to produce are:

- (1) the "source code" (Motion, pp. 2-3)
- (2) notes and "by-product files" made by Robinson during his trial-and-error attempts to produce his OWR2K5_v1.0.0.1.zip file. (Motion, p. 4)
- (3) files needed to open the OWR2K5_v1.0.0.1.zip file (Motion, p. 4).

(1) Robinson repeatedly has stated that he does not have – and he never has had – the source code. Robinson cannot give what he never had.

(2) Plaintiff says that Robinson "must have kept notes and documentation during the trial and error process, none of which he produced" (Pltf's Motion, p. 4; emphasis supplied). Robinson acknowledges that he did make notes during his trial-and-error process. However,

Robinson repeatedly has said that whatever notes he made in the course of developing the files he created, he discarded in the early part of 2005, as part of a general clean-up. This occurred long before any lawsuit was filed against him. He was under no obligation to retain any notes he made during his trial-and-error efforts, and there then was no reason for him to keep them. He threw them out as part of a general “clean-up” in the Spring of 2005. Nor was there much purpose to be served in keeping the notes. Robinson had finished his work, and he had the final product, which he did keep – and which has been turned over to plaintiff’s counsel.

As to earlier trial-and-error computer files, Robinson repeatedly has stated that, during his trial-and-error process, once he made a change and created a new file, he did not “save” the old one. Again, Robinson cannot give what he does not have.

Furthermore, what is the point of the request for notes? Plaintiff’s claim is that Robinson violated copyrights and contracts by creating computer files. Robinson has delivered all of the files that he has created. Either he created files that violated copyrights and contracts, or he did not. What notes he may have scratched along the way to remind himself of something he had tried, as part of his trial-and-error process, would appear to be of little relevance.

(3) Plaintiff’s remaining complaint is that “the subject OWR2k5_v1.0.0.1.zip file is ‘zipped’ and, as a matter of its operation, requires instructions and commands to operate. The file containing such commands and instructions was not included within Robinson’s seventeen produced CDs. Myers Affid. ¶ 5.” Pltf’s Memo, p. 4.

It is groundless to suggest that Robinson should be faulted for not including an “Unzip” program with the seventeen CD’s. This is just one step short of frivolously faulting Robinson for not including the Microsoft Operating System files needed to start a computer. “Unzip” programs are freely available to computer users.

Moreover, it is incomprehensible that Myers, who purports to be an expert on computer programming, does not know how to open a "zip" file. Attached hereto as Attachment 4 are the initial three screens that appear successively when one opens the OWR2k5_v1.0.0.1.zip file using a standard "Unzip" program.² If Myers does not have an Unzip program on his computer, or if he does not know how to open a "*.zip" file, certainly his opinion as to what other people may be capable of doing with a computer is entitled to no weight whatsoever.

Conclusion

Robinson has fully complied with Plaintiff's requests for production of documents. Plaintiff's motion to compel and for sanctions should be denied in its entirety.

By his attorneys,

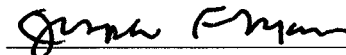


Joseph F. Ryan BBO# 435720
Lyne Woodworth & Evarts LLP
600 Atlantic Avenue
Boston, MA 02210
Telephone 617/523-6655 - Telecopy 617/248-9877
E-mail: Jryan@LWELaw.com

Certificate of Service

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent this date to any persons indicated as non registered participants.

February 9, 2006



Joseph F. Ryan BBO# 435720

² The file was unzipped and opened automatically, and the screen shots were taken, on the undersigned counsel's computer.

ATTACHMENT 1

Joseph F. Ryan

From: Michael G. Andrews [mandrews@petrieschwartz.com]
Sent: Tuesday, January 17, 2006 10:32 AM
To: Joseph F. Ryan
Subject: RE: Computer Disks and Files

We just want an affidavit that states where and when the files were pulled, that they were all pulled by Robinson himself, and that we received all of the relevant files. We do not necessarily need a list of all of the files, unless they were pulled at multiple times, from multiple places, or by someone other than Robinson.

From: Joseph F. Ryan [mailto:jryan@lwelaw.com]
Sent: Tuesday, January 17, 2006 10:26 AM
To: Michael G. Andrews
Subject: RE: Computer Disks and Files

Please clarify what you mean by: "Could you please supply an affidavit by Tim Robinson indexing the relevant information contained on the disks?"

Do you mean to list all of the files on each disk? If so, please return the disks so that I can play out the lists – or play out the lists for me.

Joseph F. Ryan
LYNE WOODWORTH & EVARTS LLP
600 Atlantic Avenue
Boston, MA 02210
Telephone: 617-523-6655
Telecopy: 617-248-9877
Email: JRyan@LWELaw.com

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-----Original Message-----

From: Michael G. Andrews [mailto:mandrews@petrieschwartz.com]
Sent: Thursday, January 12, 2006 4:25 PM
To: jryan@lwelaw.com
Cc: Irwin Schwartz
Subject: Computer Disks and Files

Dear Attorney Ryan,

Thank you for sending over the computer disks containing the files from Tim Robinson's computer, we received them on January 10, 2006 along with your letter. We are in the process of reviewing the files, but we have one concern regarding utilizing the disks as evidence. Could you please supply an affidavit by Tim Robinson indexing the relevant information contained on the disks? The information we are requesting includes where (which computer) these files were pulled from, what dates and times the files were pulled, who actually handled the pulling of the files, and that all relevant files were supplied. Its our view that an affidavit would aid the Court in the authentication process, and would be more efficient than further deposition. Thank you for your time.

Very truly yours,

Michael G. Andrews

2/8/2006

Petrie Schwartz LLP
500 Boylston Street, Suite 1860
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617.421.1800 x30 (phone)
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mandrews@petrieschwartz.com

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2/8/2006

ATTACHMENT 2

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Defendant)	

AFFIDAVIT OF DEFENDANT TIM ROBINSON
REGARDING PRODUCTION OF COMPUTER FILES

I, Tim Robinson, upon oath depose and say as follows:

1. I sent to my attorney computer disks labeled as follows:

Tracks - Disks 1-5

iRacing Beta Files

OWR2K5-v1.0.0.1 & OWSC-NOCD-Temp

Export - Disk - 1

Replay - Disks 1-9

2. Some of the files on these disks had resided on the server located at my place of work.

These were transferred to my home PC for the purpose of burning them to disks. Other files on the disks already resided on my home computer.

3. The work of transferring files and burning them to CD's took place from time to time over a period of many days. The bulk of the work occurred during a span of a week or in mid-

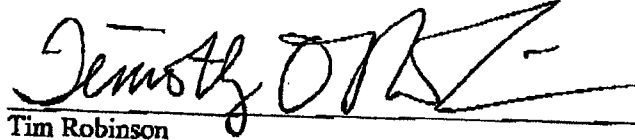
December. The OWR2K5-v1.0.0.1 & OWSC-NOCD-Temp files were copied approximately January 8 or 9, 2006.

4. I copied all of the files personally. I labeled all of the disks personally. Nobody assisted me.

5. I have supplied all known relevant files.

SUBSCRIBED AND SWORN TO under the pains and penalties of perjury this

18th day of January 2006.


Tim Robinson

ATTACHMENT 3

Joseph F. Ryan

From: Joseph F. Ryan [jryan@lwelaw.com]
Sent: Wednesday, January 25, 2006 4:46 PM
To: 'Michael G. Andrews'
Subject: RE: Robinson Discovery

I have spoken with Mr. Robinson. He assures me that he does not have any of what you are requesting.

If Mr. Myers is signing an affidavit under oath, he should think twice about using the word "inconceivable."

Joseph F. Ryan
LYNE WOODWORTH & EVARTS LLP
600 Atlantic Avenue
Boston, MA 02210
Telephone: 617-523-6655
Telecopy: 617-248-9877
Email: JRyan@LWELaw.com

-----Original Message-----

From: Michael G. Andrews [mailto:mandrews@petrieschwartz.com]
Sent: Tuesday, January 24, 2006 2:32 PM
To: Joseph F. Ryan
Subject: Robinson Discovery

Dear Attorney Ryan,

In an effort to narrow the open discovery issues before the deadline for iRacing to submit a Motion to Compel, please review the following request:

1. After reviewing the seventeen supplied CDs and December 30, 2005 response to the December 13, 2005 discovery request, we find that several files and/or documents associated with the file OWR2k5_v1.0.0.1.zip may be missing, including but not limited to raw data, source code, byproducts, previous iterations, notes and documentation, data regarding Robinson's source of knowledge for which values to change within the program, and data regarding which values Robinson actually changed within the code. Such data was not provided by Robinson.
2. Steve Myers, VP of Operations and Production and Operations at iRacing, is prepared to issue a sworn affidavit indicating that it is inconceivable that Robinson could have created the OWR2k5_v1.0.0.1.zip file without the production and use of such data. Thus, it seems clear that Robinson is in possession of such data or this data has been destroyed.
3. We plan to file a Motion Compel, seeking to compel said data and potentially requesting a court order allowing a full search of Robinson's computers, before the close of business today, January 24, 2006 if this issue cannot be resolved. We will gladly allow you further time to confer with your client regarding this issue. However, in order to do so we must stipulate to an extension for iRacing to submit its Motion to Compel, as the present deadline for the Motion to Compel is today.
4. Our apologies for the timeliness of this letter, but we have spent numerous hours reviewing thousands of files on the seventeen submitted CDs, and were unable to find the data we presently request. Thank you in advance for your time and prompt response.

Very truly yours,

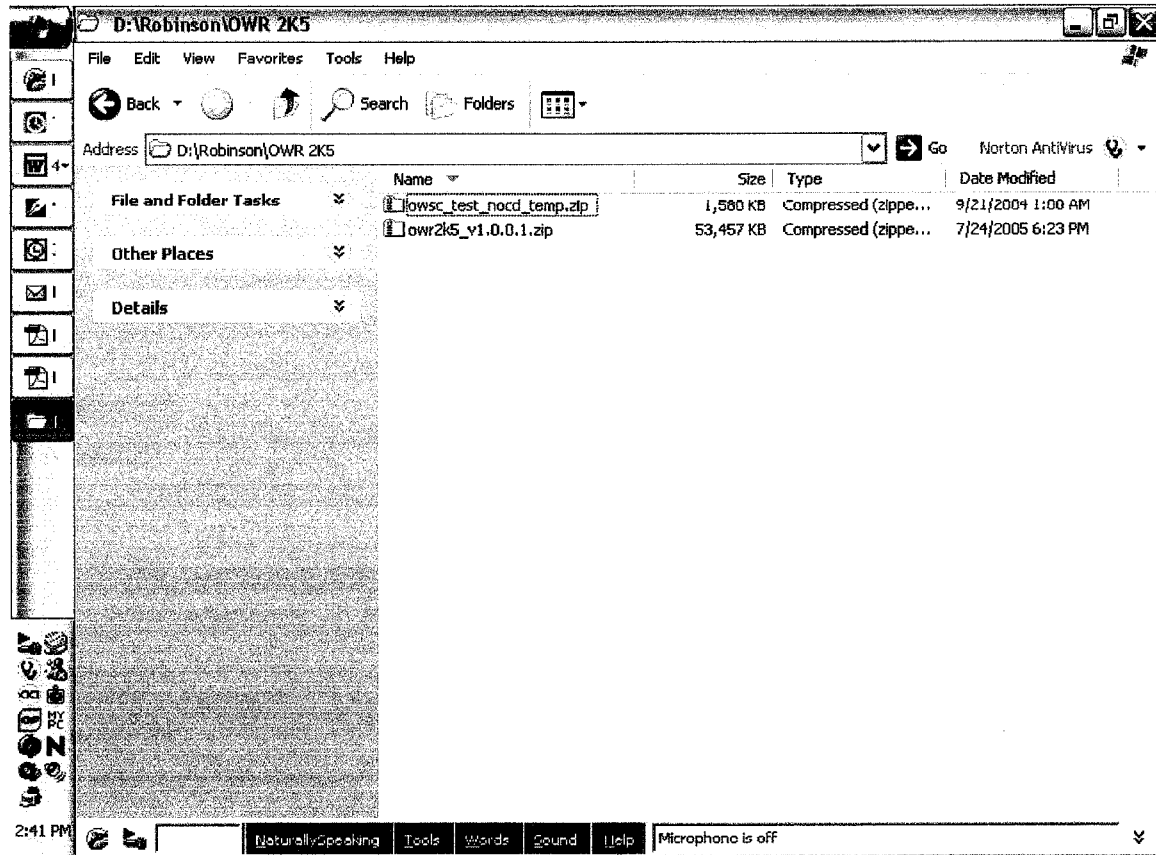
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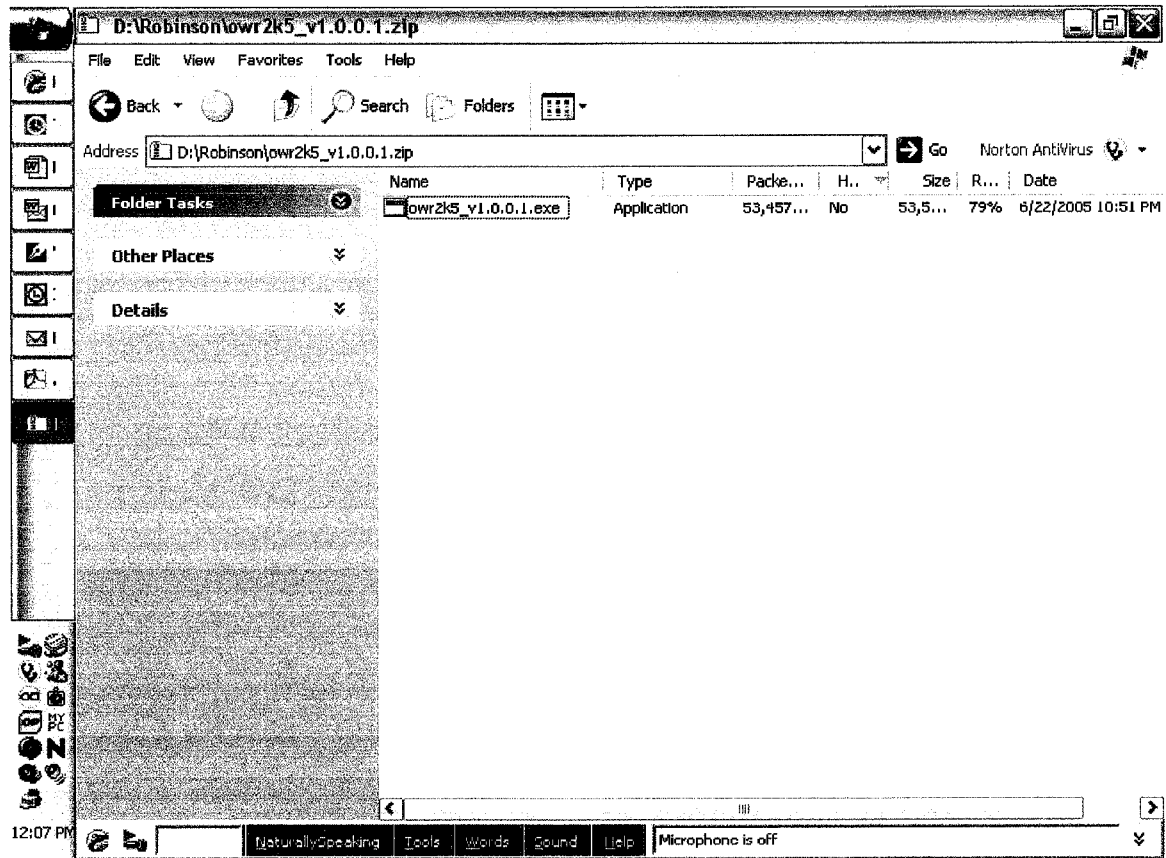
2/8/2006

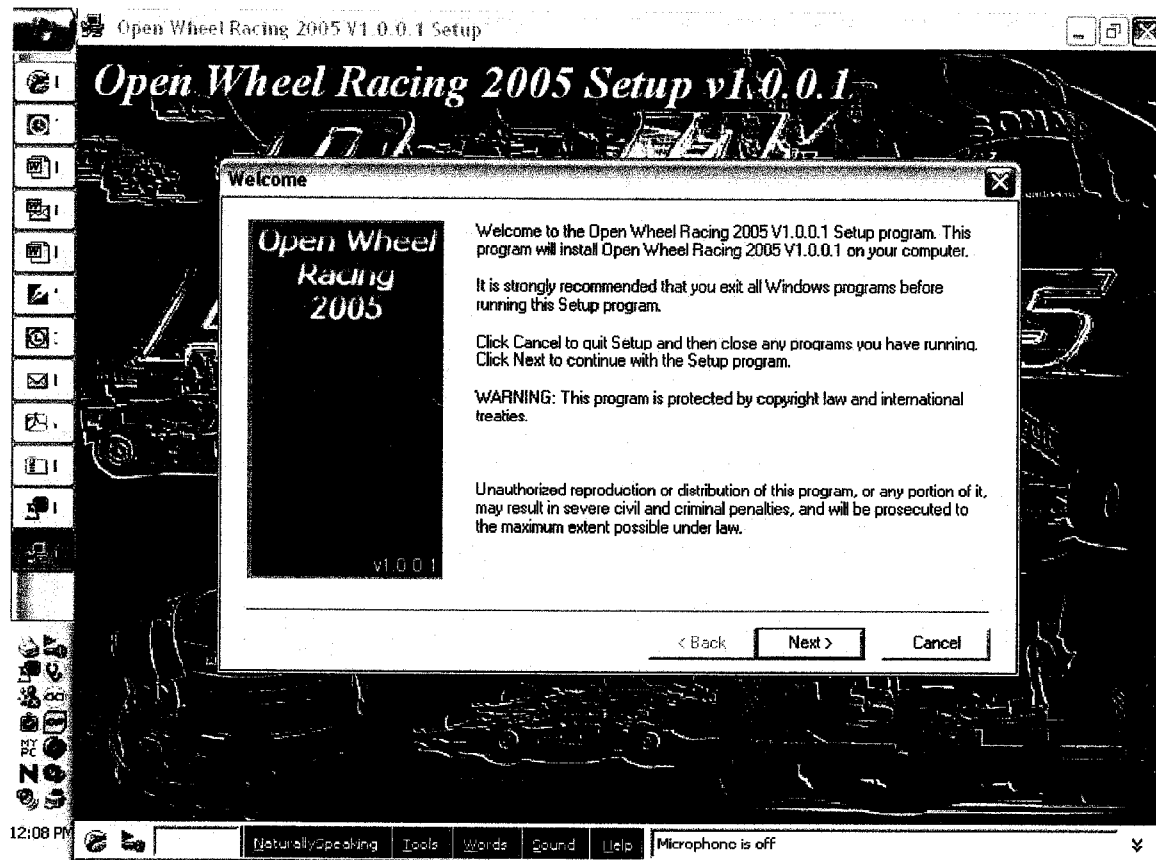
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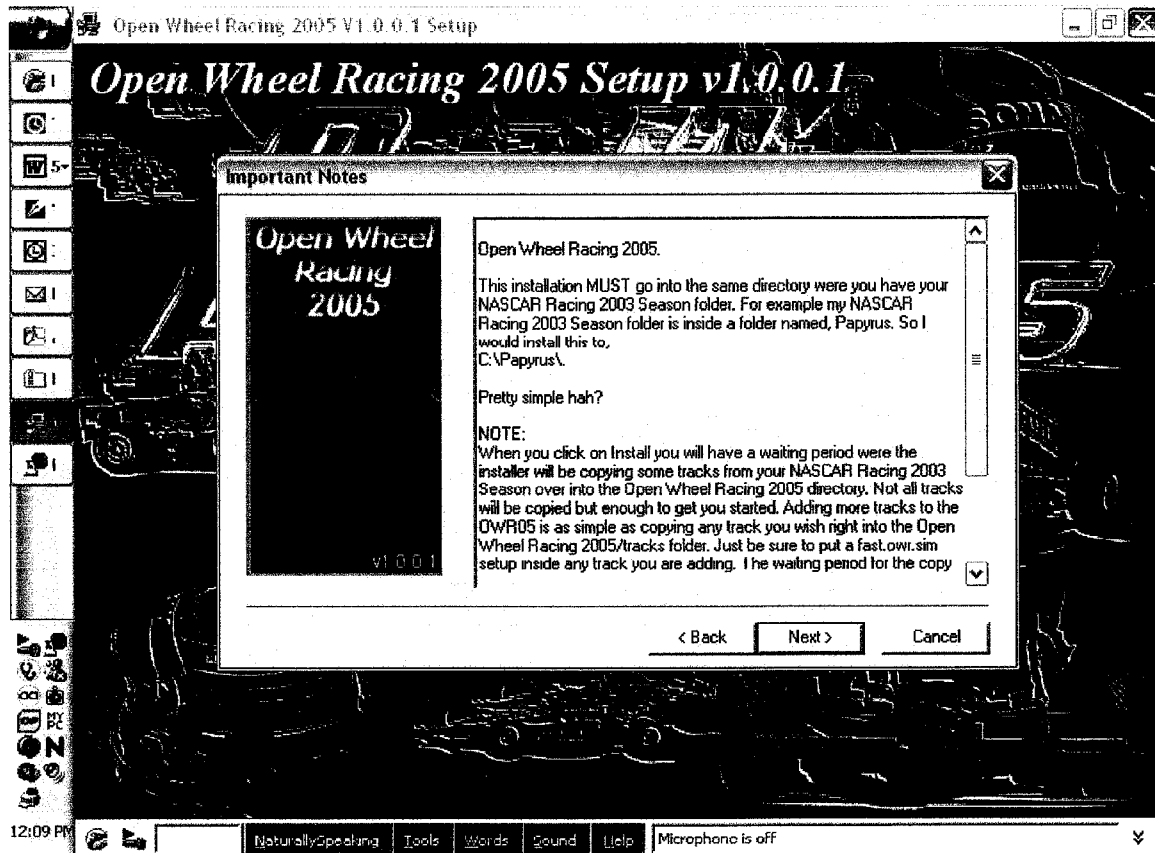
2/8/2006

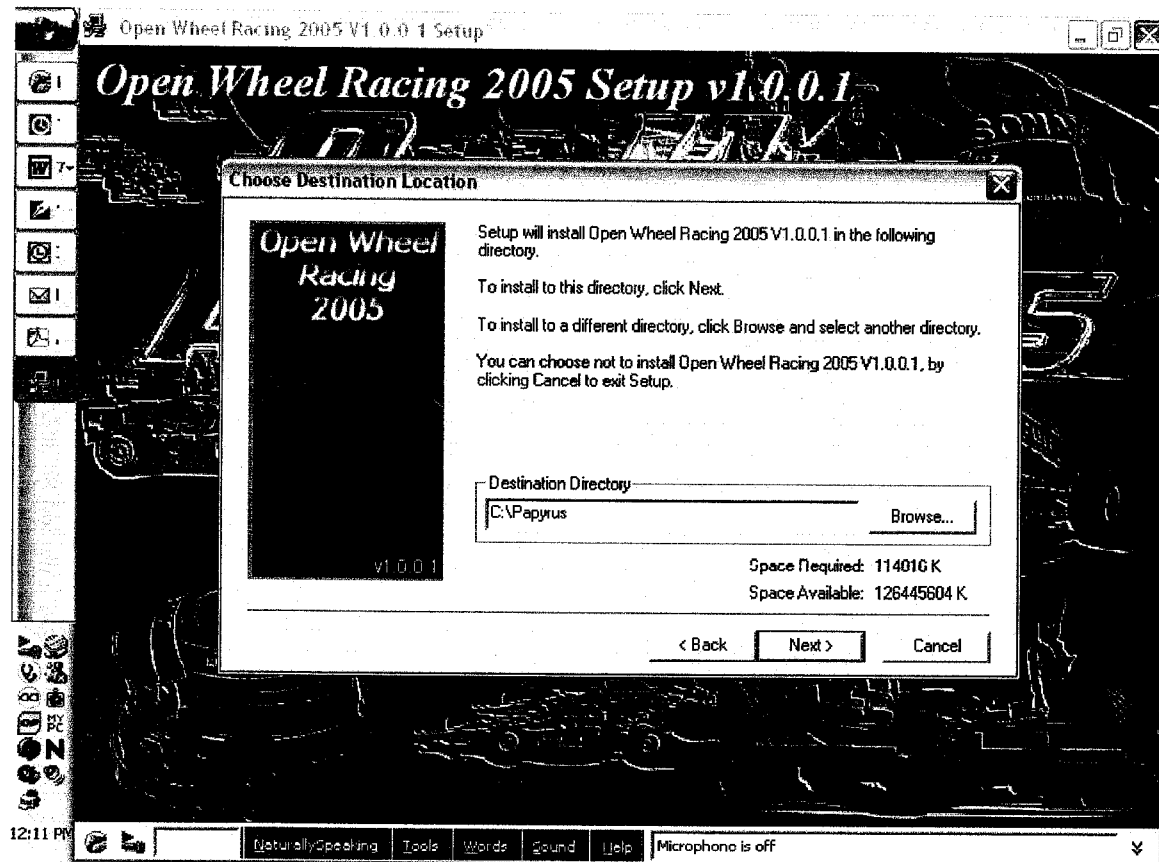
ATTACHMENT 4











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Defendant)

Civil Action No.
05-11639 NG

AFFIDAVIT OF DEFENDANT TIM ROBINSON
IN OPPOSITION TO PLAINTIFF'S
"MOTION TO COMPEL AND FOR SANCTIONS"

I, Tim Robinson, upon oath depose and say as follows, in response to the statements made by Attorney Irwin Schwartz in his "Motion to Compel and for Sanctions" and the statements made by Steve Myers in his Affidavit:

Motion, p. 2: Robinson failed, without justification, to produce all responsive documents to the Discovery Request. Specifically, the Discovery Request sought, among other things:

1) All files created and/or distributed by Robinson that work with or modify NR2003;

Response: Everything I have, they have. Whether they believe it or not is their problem.

2) Source code (high-level language, assembly, or binary (hex)) of any program modifications developed by Robinson or others that were incorporated into Robinson's "mod";

Response: I don't have now, or ever did, have access to any source code. As I have said on numerous occasions, any notes I created have long ago been destroyed.

3) Source code, configuration files, and executables for programs created or used by Robinson to patch NR2003.exe (other than commercial products such as UltraEdit);

Response: Once again, I don't have any specific information related to this request.

4) *Specific patch data for "mods" of NR2003 distributed by Robinson, whether developed by Robinson or received from third parties . . . and*

Response: I never received "patch data" from anyone.

8) *Source code for the NO-CD executable.*

Response: Once again, I do not have any source code for anything!

Myers Affidavit:

4. I carefully examined the internal files contained in OWR2k5_v1.0.0.1.zip. Based on that examination, I believe that there are additional files associated with OWR2k5_v1.0.0.1.zip that are responsive to iRacing's discovery requests that have not been produced, including but not limited to raw data, source code, by-products, previous iterations, all of which exist for any software development project such as Robinson's work on OWR2k5_v1.0.0.1.zip. Moreover, all software developers retain notes and documentation, and/or data regarding the software code values changed within the program. Based on these materials, a third party can see exactly what Robinson did to create OWR2k5_v1.0.0.1.zip.

Response: Mr. Myers can believe whatever he wants, however, once again I will state that I have no source code, by-products, previous iterations, or any other type of raw data. As I said in my deposition, anything I used for this endeavor was subsequently destroyed in or around May or June of 2005 during a routine cleaning of my office. His comments about software developers may be true to some extent, but I am not a trained software developer by any stretch of the imagination, and have never claimed to be a software developer. If I had any of what they were looking for, I would have turned it over long ago.

5. For example, OWR2k5_v1.0.0.1.zip is a "zipped" computer file, which contains a custom-built installer using Mindvision Software's VISE installer. This Mindvision application is not native to NR2003, and in fact, is specifically used to add, copy and move files. For the Mindvision file to operate, it needs custom-programmed instructions.

Nevertheless, Robinson did not produce anything reflecting the Mindvision instructions and commands on the produced CDs.

Response: Once again I will reiterate, I no longer have any of the files associated with the creation of the installer. They were deleted in May or June of 2005.

6. Another example is a file added in the installation process of Robinson's program, OWR05.exe. This file is a modified version of the NR2003.exe file contained as part of iRacing's NASCAR Racing 2003 Season software program. To create OWR05.exe, Robinson had to undertake a complex process, especially since he testified that he used a hex editor to do his work. It is virtually impossible to achieve a final working version of a file such as OWR05.exe on a first attempt using a hex editor. In the trial-and-error process Robinson testified to, he would have to create several versions of OWR05.exe, which are significant by-products of his development process. Nevertheless, Robinson produced no other versions, iterations, or by-products of attempted iterations of OWR05.exe in the Production CDs.

Response: No where did I ever say that I created OWR05.exe on the "first-attempt" using a hex editor. I also said in my deposition that when something was changed, I created a new file with the changed value, tested it, accepted it, or changed it again. That is my definition of the iterative work that was done. I specifically said that I did not keep multiple versions of anything because it was confusing. I also said I no longer have any of the materials. Once again, I will reiterate, I no longer have any material associated with the project other than what has been provided.

7. In addition, when a hex editor trial-and-error process is utilized to create software such as OWR2k5_v1.0.0.1.zip, it is necessary to keep notes and documentation during the trial and error process. Moreover, it would have been almost impossible for Robinson to edit the iRacing software without specific knowledge of exactly what values to change, which would be reflected in notes or memos identifying those values. Nevertheless, Robinson produced no notes or documentation reflecting his trial-and-error process, the source, extent, or documentation of Robinson's understanding of the iRacing software values that he changed and edited or what documentation he received that identified the values to change.

Response: Once again, Myers can believe what he wants, but as I have stated on now countless occasions, I have no notes. They were destroyed in May or June of 2005. His comments about "memos identifying those values" suggests that someone would have sent me info on what to do or change and that is categorically false!

9th SUBSCRIBED AND SWORN TO under the pains and penalties of perjury this
day of February 2006.


Tim Robinson